

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO ~~FALLS~~ POTATO GROWERS
ASSOCIATION AND IDAHO TRAF-
FIC ASSOCIATION, Et Al,

and

TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS, LO-
CAL 983, A.F.L.

No. 10490

PETITIONERS' REPLY BRIEF

*Upon Petition for Review and Petition for Enforce-
ment of Order of the National Labor Relations Board*

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FILED

APR 19 1944

PAUL P. O'BRIEN,

CLERK

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Your Petitioners had hoped to avoid the necessity of filing a reply brief. We did not believe counsel for the Respondent would take issue upon our Statement of Facts. A correct statement of the facts with reference to the nature of the Petitioners' operations in growing and sacking potatoes is of such extreme importance in the determination of the status of these employees as agricultural laborers we are compelled to bring these facts out in clear relief.

In misconstruing the facts, counsel for the Respondent has relied entirely upon the stipulation in the record (p. 273), referring to just two or three of the petitioners, and has failed to consider the testimony of the Petitioners C. R. Holden, A. G. Stanger, L. B. Holden, Farrel Hansen, and Rowena O'Neill, all of whom verify Petitioners' statements with reference to both the raising their own potatoes and ownership and control of workers and potatoes.

Perhaps the simplest way to clarify these facts is to quote directly from the record, and for this purpose we refer first to the testimony of C. R. Holden, (pp. 190 and 191) on the question of how the potatoes are packed by the Petitioners in the farmers' cellars and on their farms:

"Q. About your particular operation; yes.

A. It is our practice on the country crews, we line up nine men, — it takes nine men to the crew, and one man on the crew is the foreman, and they are known as country crews. They are very seldom in the warehouse, unless they should happen to leave from the warehouse, and we furnish them conveyance to get to the job, — and they do practically their entire work on the farm, in the farmers' cellar. We buy these potatoes from the farmer. If he packs them, we allow him a certain amount for that. If we pack them, we buy them for so much and deduct the amount we pay for packing. In other words, if it costs you a dime to pack them, and the

farmer packs them himself, we allow him a dime, — or we did at that time. If we buy them and pack them with these country crews, we figure we paid him a dime less on the price.”

“ In other words, they take them out of the farmer’s cellar without the culls and any decay that might be in them. They run these potatoes over a sorter and run them into bags, and then either the farmer hauls them with his own truck from his farm to the car, or to the warehouse, or we haul them with our trucks direct to the car or warehouse. Does that answer the question?”

The next statement of fact made by the Petitioners but questioned as a statement of fact by counsel for the Board is the following:

(a) “THE PURCHASERS OWN AND OPERATE THEIR OWN FARMS UPON WHICH THEY GROW POTATOES THAT ARE PACKED ALONG WITH THE POTATOES PURCHASED FROM OTHER GROWERS.” (PP. 264, 185, 186, 263, 275 and 276.)

Perhaps the best way to substantiate this fact is to again quote from the record. The testimony of A. G. Stanger of the Warehouse Company, on pages 263, 264, 266 and 267 is as follows:

“Q. Now, do the members of your family who own the corporation also grow potatoes?

A. That is right; we do.

Q. And does the corporation handle and ship the potatoes grown by the members of the family?

A. That is correct.

Q. All of the potatoes grown by them?

A. Not all of them, because some of them are taken to the flour mill by the trucks from the farms, and so forth, and (145) in that particular case they wouldn't but in the most part the potatoes are handled for the family.

Q. Now, does the corporation have some special arrangement in handling the potatoes of the family that is distinguished from the handling of potatoes of other growers?

A. That is correct. The potatoes from the family are handled in very much the same fashion as described by Mr. Hansen for the Potato Growers Association; in other words, they are turned over to us to handle"

"Q. Can you give us the approximate percentages for last year of the entire potatoes that you handled and shipped, that were shipped, first, by the members of your family?

"A. I couldn't give that to you exact there; it would be approximate, because it varies each year, but I would say that possibly last year, fifteen per cent."

The statement of C. R. Holden of Holden Brothers, on pages 185 and 186 of the Transcript testified as follows:

A. I mean our general operation is farming. Most of our revenue and our operations is strictly farming, growing potatoes and stock.

Q. Does the partnership still operate their warehouse?

A. Part of the time, mostly for our own use in production (33) that is handled and grown on our own farm.

Q. Do you still purchase potatoes and carry on sorting?

A. We do, some; yes, sir.

Q. Do you, — and you have employees who are engaged in that work of sorting and handling the potatoes?

A. We have some employees, a small portion of the amount the old corporation you spoke of had. Most of the employees we now have work, a large portion of them, around on the farm, and sometimes work in the warehouse in the winter time when they can't work on the farm. That is correct.

Q. What percentage of the potatoes you now handle are from your own farm?

A. Well, I would say this season, off-hand, about sixty-five or seventy per cent."

In addition to these two witnesses, the Board admits that Stuart and Wilson grow some of their own potatoes, and Mrs. O'Neill raised a large portion of her potatoes in the 1942-1943 season.

Added to this, it is undisputed that the Petitioner Potato Growers, a Co-op, raised all of its potatoes under the agency theory of a pure farmers' cooperative marketing association; in other words, all of the potatoes were owned by the producers and packers.

The next statement which the Board claims is not supported by the record is as follows:

(b) "MOST OF THE POTATOES ARE SUBJECTED TO A PRELIMINARY ROUGH-ING OPERATION IN THE GROWER'S CELLAR AND ON THE FARMS."

On this point we again quote from the record (P. 183), the testimony of C. R. Holden, as follows:

"Q. You had facilities for the sorting and packing of potatoes at that warehouse?

A. We packed a large portion on the farms, but some were repacked in the warehouse here, correct. I would say that ninety per cent of our potatoes was packed in the growers' cellars on the farms, and some of those came into the warehouse and was repacked, and others moved direct in the cars. (29)."

And again from the testimony of A. G. Stanger (P. 269), as follows:

“A. Our employees didn’t handle them; no.

Q. Of those that were packed by you, am I correct in this: Like the other shippers some of the potatoes will be rough-sorted in the cellar and sent in for further sorting in the warehouse, while others will have the grade made in the cellar, and will be shipped directly?

A. That is correct.”

And again from the testimony of L. B. Holden, on Page 215 of the transcript, as follows:

“A. Unless they are coming by their place and it is after they are on the way home they could be dropped off; they could you know.

Trial Examiner Barton: How are these men put on a job; are they told at the warehouse to go out at this place, to a certain job?

The Witness: Well, there might be they would have a job in some cellar, if a grower wants them to come over. Lots of times in a neighborhood if they are packing one grower’s cellar there will be three or four and they will band together and take one right after another and do their own and there will be times one grower will tell them, when he has the crew, that he has sold and he wants them to come over there but they will tell them every night generally so they will know where they are going the next morning.”

Also the same witness on Page 217 of the Transcript, as follows:

“A. Well yes. They have to make the grade, U. S. Grade No. 1 or U. S. Grade No. 2 in the country the same as they do in the warehouse. Our potatoes are all sorted and bought on grades. They are times when they are dirty or roughed up, (84) roughed over, and but they are brought in, and then as soon as prices are a little higher then the growers are all inclined to sell them in the cellar and it is all about the same.”

The statement made by Petitioners as follows:

(c) “A LARGE NUMBER OF THE EMPLOYEES ENGAGED IN SORTING AND PACKING POTATOES ARE FARM BOYS LIVING IN THE COMMUNITY, RETURNING TO THE FARMS WHEN THE PACKING SEASON IS OVER”

does not seem to be seriously disputed by the Board, but we offer the Court the further testimony from the record, the testimony of C. R. Holden, (P. 186), as follows:

“A. We have some employees, a small portion of the amount the old corporation you spoke of had. Most of the employees we now have work, a large portion of them, around on the farm, and sometimes work in the warehouse in the winter time when they can't work on the farm. That is correct.”

And further the testimony of A. G. Stanger, (P. 266), as follows:

“A. Oh, I would say, roughly, — and it is merely a guess because I would have to go to the record, — I would say possibly not over twenty-five per cent are handled by the boys that (147) work on the farm the year round.”

And further the testimony of L. B. Holden, on Page 231 of the Transcript, as follows:

“A. Well, I would say a large percentage of them do help on the farm and some in the harvest.

Q. So that a large percentage of them do work?

A. I couldn't say what the percentage was, but we will have a lot of them as soon as the beets are in and harvested and they will come in; we had a lot this year, or last year.

Q. They help plant and help harvest?

A. They will help harvest and put them in the cellars and come back and help us.

Q. And when you are packing they will go back — when you are through, — they will go back to the farm?

A. Yes.”

(d) THE POTATOES ARE NOT CHANGED IN FORM AND THE OPERATION OF

SACKING AND SORTING IS THE USUAL SIMPLE OPERATION PERFORMED BY THE FARMER IN PREPARING HIS PRODUCT FOR MARKET (P. 218 and 241)

the testimony of Farrel Hansen (P. 241), as follows:

“A. The farmer himself, or the farmer’s hired man, or trading help, one farmer with another. Very, very few farmers in the cellar that don’t at least furnish one man or himself, on the crew.

Q. You mean by that they are present in the cellar to (113) watch the work being done, or do they actually participate in the work?

A. Actually participate in the work.”

(e) CONTROL OVER THE METHOD OF PACKING THE POTATOES REMAINS WITH THE GROWER (PP. 226, 227)

the testimony of L. B. Holden, as follows:

“Q. Lloyd, can you tell us how much control of any the farmer has over, — when these crews are not working at the farmer’s, whether directly or indirectly?

A. I would say one hundred per cent as to staying on, as if the potatoes are not sorted to his satisfaction or his way (94) of thinking; I don’t know what the general practice is, but he will put him out or he will call up and have

someone else called out; that farmer may do that. May be the grower who was thinking or thought it was not a fair grade and something was going in that should come out and he would call up the office and say to send out certain ones or take this crew out entirely.

Q. He really runs the show then?

A. Oh, yes. These potatoes are bought, that is, as U. S. Grade No. 1 and if we miss the grade we call the grower up and he will come in and he hasn't paid until they are all number one grade."

(f) OWNERSHIP IN THE POTATOES REMAINS WITH THE GROWER UNTIL THE GRADE IS MADE, AND IN THE CASE OF THE IDAHO POTATO GROWERS, INC., UNTIL THE POTATOES ARE SOLD (PP. 258, 259)

the testimony of Farrel Hansen (P. 240) as follows:

"A. It depends on what the farmer himself wants to do. In other words, they are his potatoes, and I am working for him, just like anybody else, and if he wants to sort those potatoes himself, well, he gets the order and loads them on the car. If he wants me to rustle his crew for him and send them out to his farm, I do that. If he wants to pay for them with his own check, he can do that, or if he wants me to deduct it out of the potatoes and pay them, I do that."

(g) IN SOME INSTANCES THE COST OF LABOR IN PACKING IS BORNE BY THE GROWER AND SOMETIMES THE CREW SORTING AND SACKING THE POTATOES MAY MOVE FROM FARM TO FARM WITHOUT WORKING IN THE PETITIONERS' POTATO SHED (P. 257)

the testimony of L. B. Holden (P. 233), as follows:

“Q. In other words, the farmer in the final analysis pays the crew for the packing?

A. Yes.

Q. Is that an exact charge for the particular amount in his particular packing, in each instance?

A. Well, a good pack will sell for more than a poor pack.

Q. And the labor makes the difference?

A. Yes, the labor, and the sacks and the crops.”

the testimony of L. B. Holden (P. 214), as follows:

“Q. Well, who would pay the wages?

A. Well there are times when we would pay the wages and there are some times when he would pay the wages, when the growers pays them. If he sells them to some other dealer then he does but if he sells them to us at some other date later then he does or we just deduct them.

Q. But as this work is done, I mean, there are workers actually performing this work and that work has to be paid for at the time of the work and who pays for that?

A. If the grower doesn't we do. (80)."

(h) ALL OF THE PACKING IS DONE WITHIN A VERY SMALL AGRICULTURAL AREA OF PRODUCTION ADJACENT TO THE FARMS.

the testimony of L. B. Holden (P. 231), as follows:

"A. Well, I would say a large percentage of them do help on the farm and some in the harvest.

Q. So that a large percentage of them do work?

A. I couldn't say what the percentage was, but we will have a lot of them as soon as the beets are in and harvested and they will come in; we had a lot this year, or last year.

Q. They help plant and help harvest?

A. They will help harvest and put them in the cellars and come back and help us.

Q. And when you are packing they will go back, — when you are through, — they will go back to the farm?

A. Yes."

A review of the above statements made by the witnesses themselves, should conclusively establish in the Grower: (1) complete control, ownership and domination over both the employees and the products sorted, and (2) that the act of sorting and sacking potatoes is the usual simple farm operation performed by either a farmer or his hired man; That these facts constitute by all means of measurement "agricultural labor."

The Board has carefully avoided any reference in its Brief to the three cases decided by the Supreme Court of the State of Idaho, wherein the Court in three separate decisions held that (1) packing and crating of head lettuce in a warehouse; (2) working on a feeding lot next to a packing house; and (3) working as an employee on a corporation-owned water canal is "agricultural labor." *P. G. Batt vs. Ind. Com.*, 63 Idaho 572, 123 Pac. (2d) 1004; *Carstens v. Ind. Com.*, 63 Idaho 613, 123 Pac. (2d) 1001; *Big Wood Canal Co. vs. Ind. Com.*, 63 Idaho 785, 123 Pac. (2d) 15.

We wish to urge again the distinction between the instant case and the North Whittier Heights case, 109 Fed. (2d) 3681, the employees in this case are doing the common menial farm task of packing and sacking potatoes, using little or no skill; all the employees are rotated from time to time from one job to another; the farmer frequently having his own sorter and having formerly done this work on the farm by himself. All of these facts point to the conclusion

that this is not a skilled occupation and does not require any training or experience.

In conclusion we wish to refer to a recent California case, *California Employment Commission v Butte County Rice Growers Association* (Cal. App.), 138 P. 2d 347, wherein the Court held that a cooperative association maintaining a warehouse where rice was stored and cleaned and prepared for market, and where seeds were stored and furnished to the members, that the employees working in these warehouses were "agricultural employees."

"It is clear from a reading of the opinion that the court regarded the Association, which did business for members only, as simply engaged in activities which represented an extension of the agricultural activities of the members carried on by them on their individual farms, and that the Association was simply a medium for furthering such activities. In this connection the court said in part:

'Clearly the defendant Association was organized and the warehouse was maintained as an agency and means of producing, preparing and marketing the crops of the respective members. It furnishes a method of jointly procuring farm supplies and employees in the manner provided by law. In no sense may the business of the Association be deemed to be a commercial enterprise as distinguished from a farming industry'."

It is clear from this decision that the Idaho Potato Growers, Incorporated, the cooperative involved in the instant case, is performing the same service as is performed in the Butte County Rice Growers Association case, or clearly "agricultural labor", and if the work performed by these employees is identical with the work performed by the employees of the other petitioners, certainly all employees involved herein are "agricultural laborers" as defined by the law.

Dated April 1, 1944.

Respectfully submitted,

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